Supreme Court, U.S.
FILED
APR 25 2003
CLERK

No. 02-658

IN THE
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR TECK COMINCO ALASKA INCORPORATED IN SUPPORT OF PETITIONER

ROBERT T. CONNERY
MARCY G. GLENN
HOLLAND & HART LLP
555 Seventeenth Street
Suite 3200
Denver, Colorado 80202
(303) 295-8000

* Counsel of Record

LAWRENCE L. HARTIG
ROBERT J. MAHONEY*
HARTIG RHODES HOGE & LEKISCH
717 K Street
Anchorage, Alaska 99501
(907) 276-1592

Counsel for Teck Cominco Alaska Incorporated

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

14 pp

RULE 29.6 STATEMENT

Teck Cominco Alaska Incorporated ("Teck Cominco") was a petitioner in the Ninth Circuit below and is a respondent supporting petitioner in this Court. Teck Cominco is a wholly-owned subsidiary of Teck Cominco American Incorporated, which is wholly owned by Cominco Mining Worldwide Holdings, Ltd., which is wholly owned by Cominco Mining Partnership, a partnership of Teck Cominco Metals, Ltd. and Teck Cominco Nova Scotia, Ltd. Teck Cominco Nova Scotia, Ltd. is wholly owned by Teck Cominco Metals, Ltd., which is wholly owned by Teck Cominco Limited, a publicly held company.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND REGULATORY PROVISIONS	2
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASE:

Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) 7

STATUTES:

28 U.S.C. § 1254(1) 2

42 U.S.C. §§ 7401 *et seq.* 2

42 U.S.C. § 7413(a)(5) 3

42 U.S.C. § 7475(a)(4) 2

42 U.S.C. § 7477 3

42 U.S.C. § 7479(3) 2, 5, 6

42 U.S.C. § 7607(b)(1) 2

43 U.S.C. §§ 1601 *et seq.* 2

LEGISLATIVE MATERIAL:

S. Rep. No. 95-127 (1977) 5

IN THE

Supreme Court of the United States

No. 02-658

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR TECK COMINCO ALASKA INCORPORATED IN SUPPORT OF PETITIONER

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 298 F.3d 814 and reproduced at Pet. App. 1a. The Ninth Circuit's prior opinion concluding that it had jurisdiction over this case is reported at 244 F.3d 748 and reproduced at Pet. App. 17a. The Ninth Circuit's order requesting supplemental briefing is reproduced at Pet. App. 24a. The orders of the United States Environmental Protection Agency ("EPA") are reproduced at Pet. App. 26a, 38a, and 51a.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 30, 2002. Pet. App. 1a. The State of Alaska, Department of Environmental Conservation, filed a petition for certiorari on October 25, 2002. The petition was granted on February 24, 2003. 123 S. Ct. 1253. The jurisdiction of the Ninth Circuit was based on 42 U.S.C. § 7607(b)(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutory and regulatory provisions are set forth in an addendum to the brief of petitioner State of Alaska.

STATEMENT

Under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, no "major emitting facility" may be constructed or modified in any "clean air" area unless the facility is subject to the "best available control technology," or "BACT." 42 U.S.C. § 7475(a)(4). BACT is defined as "an emission limitation * * * which *the permitting authority*, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *." *Id.* § 7479(3) (emphasis added). In Alaska—as in most States—the "permitting authority" under the Act is the State.

Teck Cominco operates the Red Dog Mine, the world's largest source of zinc concentrate, in Northwest Alaska on lands owned by the NANA Regional Corporation, a regional Native corporation established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* When Teck Cominco decided to modify its facilities to increase production at the Red Dog Mine, Teck Cominco sought permission from the State of Alaska, which subsequently issued a permit designating a certain technology—"Low NOx"—as BACT for a new generator that Teck Cominco planned to build, the MG-17 generator. The EPA disagreed

with the State's BACT determination for the MG-17 generator, however, and issued a series of enforcement orders blocking its construction unless Teck Cominco used a different technology—SCR—that the EPA considered BACT.

Alaska and Teck Cominco sought review of the EPA's orders in the Ninth Circuit. That court agreed with the EPA's contention that the EPA's authority to issue orders enforcing any "requirement" of the Act, *see* 42 U.S.C. §§ 7413(a)(5), 7477, gave it the authority to issue the orders in this case. According to the court below, the State is empowered as the permitting authority to make "the initial BACT decision." Pet. App. 9a. The court held, however, that the Act "provides for EPA enforcement when the state issues a permit based on an improper determination," and "the EPA has the ultimate authority to decide whether the state has complied with the BACT requirements." *Id.* 10a-11a. The court rejected the contention of Alaska and Teck Cominco that what constitutes BACT is determined under the Act by the permitting authority, and that the requirement that a permit contain such a limitation did not give the EPA the authority to substitute its judgment on what constitutes BACT for that of the permitting authority—the State. *Id.* 11a.

Teck Cominco sought but was denied a stay of the Ninth Circuit's judgment. As a direct result of the Ninth Circuit's decision, Teck Cominco—which had spent over a year engaged in discussions with ADEC concerning the permit—was compelled to undertake new discussions with the EPA in an attempt to resolve the BACT issue, at least on an interim basis, and allow for construction and operation of the MG-17 generator. When the State of Alaska sought review of the Ninth Circuit decision in this Court, Teck Cominco filed a response in support of the petition, stressing the importance of resolving which entity—the State or the EPA—was vested with discretion to determine BACT under the CAA. If the judgment below is reversed and the State's

authority to make the BACT determination is confirmed, Teck Cominco will adjust its activities under the permit as appropriate.

SUMMARY OF ARGUMENT

Congress vested the States with the discretion to determine BACT on a case-by-case basis, after weighing energy, environmental, economic, and other costs. The BACT determination can be a complex one, and regulated companies work diligently with state agencies in the course of the permitting process, providing background information, responding to technical inquiries, assessing alternative proposals, and addressing particular concerns. Allowing the EPA to overturn a State's BACT determination and substitute its own view of what constitutes BACT in a particular case—at the end of the permitting process or perhaps even years later—is not only contrary to the Act's text and history, but would introduce disabling uncertainty into the permitting process, given the critical role the BACT assessment can play in determining whether particular development projects may or may not proceed.

Such a role for the EPA is also contrary to Congress's determination that the States are best situated to decide how to manage permitted growth within nationally established limits. Here there is no dispute that Alaska's determination that Low NOx was BACT resulted in emissions consistent with national ambient air quality standards and consistent with the available increments in this clean air area. How to allocate growth within those limits was for the State to decide, and the State could decide that avoiding impairment of the competitiveness of one of the few providers of year-round employment in a challenging region of the State was an important consideration in determining BACT "on a case-by-case basis," particularly since the State's approach resulted in cleaner air than the approach favored by the EPA. It is perhaps not surprising that the EPA weighed the factors

differently, and gave greater weight to promoting what it called "the control technology of choice," J.A. 129, rather than local employment challenges. What is clear is that Congress intended such a decision to be made by the States, not the federal agency.

ARGUMENT

1. The Ninth Circuit's decision below introduces uncertainty and confusion into one of the most important determinations confronting entities subject to regulation under the CAA. Congress provided that BACT be determined on a case-by-case basis by the permitting authority, taking into account energy, environmental, and economic impacts and other costs. 42 U.S.C. § 7479(3). As the statutory language itself makes clear, the BACT determination is highly subjective and discretionary, depending on site-specific considerations and policy-based judgments about various potentially competing factors. As the Senate Committee explained with respect to BACT, "the phrase has broad flexibility in how it should and can be interpreted, depending on [the] site." S. Rep. No. 95-127, at 31 (1977).

Given this flexibility, and the broad discretion vested in the permitting authority, regulated entities work closely with the permitting authority when undertaking a significant project subject to BACT review. That planning and consultation process takes on added significance when atypical site-specific considerations are likely to figure prominently in the BACT determination, as is often the case, for example, when considering a project in the uniquely challenging setting of arctic Alaska. In this case, Teck Cominco spent over a year working with ADEC in the permitting process, responding to various issues and inquiries, and altering its planning to respond to state concerns.

At the end of that process, and without filing comments on the proposed Teck Cominco permit, the EPA issued its order overturning ADEC's BACT determination. The asserted

basis for the EPA's order was that the ADEC permit violated a "requirement" of the CAA. The only pertinent "requirement," however, is that the PSD permit subject the source to a BACT limitation determined by "the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). There is no dispute that the permit in this case contains such a limitation; that it was determined by ADEC, the permitting authority; that ADEC made this determination on a case-by-case basis; and that ADEC did so after expressly considering energy, environmental, and economic impacts and other costs. *See* J.A. 157-158, 200-211. The EPA's objection, in other words, is with the underlying merits of ADEC's determination. The EPA's own orders and documents make that abundantly clear. But nothing in the CAA *requires* a particular BACT determination, and therefore nothing in the CAA authorizes the EPA to block a State's determination simply because the EPA disagrees with it.

Authorizing the EPA to do so creates grave uncertainty for a regulated entity, as Teck Cominco's case makes clear. If the EPA—not, as the CAA provides, "the permitting authority"—is to have "the ultimate authority" with respect to a BACT determination, Pet. App. 10a-11a, then extensive planning and coordinating with the permitting authority may all be for naught. It is no answer to suggest that the EPA be included in such ongoing discussions because the resource and personnel limitations of the EPA prevent it from devoting sufficient attention to a particular source to achieve the same level of understanding of relevant site-specific factors as the permitting authority. This case proves the point; the EPA did not weigh the site-specific considerations and the pertinent energy, environmental, economic and other impacts in reaching its conclusion on BACT.

It is one thing to say that a permitting authority's BACT determination may be subject to standard arbitrary and

capricious review during the normal review process; regulated entities can live with that limited uncertainty, particularly since they can participate in compiling a thorough record supporting the permitting authority's determination. It is quite another to conclude, as did the Ninth Circuit below, that a different regulator can simply second-guess the permitting authority's decision, with the question being whether the *second* regulator's determination is arbitrary and capricious, based not on the full record of the *permitting* authority's decision, but solely on the record of the *second* regulator's determination.

It is important to recognize that the uncertainty introduced by the decision below is in no sense limited to the permitting and planning process. The EPA's position—accepted by the Ninth Circuit—would allow the EPA to "enforce" its view of what BACT should be long after a permit has been issued and a company has invested heavily in costly technology required to comply with the permitting authority's different view. This concern has been raised repeatedly throughout the briefing in this case, *see, e.g.*, Pet. Ct. App. Br. 48, and the EPA has never suggested that it lacks such authority. Its reading of the CAA simply does not admit of such a limitation.

And the adverse consequences of the uncertainty and confusion introduced by the Ninth Circuit's decision are not visited only on companies striving to comply with the CAA, but on the permitting authority as well. Companies have little incentive to coordinate and cooperate with state authorities if determinations made by those authorities are not given binding effect. *See Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60-61 (1987) (allowing citizen suits for past Clean Water Act violations would "curtail[] considerably" discretion of regulator to enforce Act through agreement with regulated entities).

2. Granting the EPA "the ultimate authority" with respect to BACT determinations, Pet. App. 10a-11a, is inconsistent with Congress's recognition that what constitutes BACT in any particular case turns not only on site-specific considerations more suited to assessment by state authorities, but also on a policy-based judgment about how best to manage local growth within national limits. Those judgments cannot be made on the national level. These considerations are highlighted in the present case. ADEC officials—sensitive to the challenges of operating north of the Arctic Circle—were in the best position to weigh the "economic impacts" not only on Teck Cominco, but also on the isolated workforce with few other viable opportunities for year-round employment, particularly in the private sector. The EPA officials may well have wished to balance the costs differently, and favor promotion of a technology never before imposed as BACT on this type of source over a more cost-effective approach that achieves the same environmental result. *See* J.A. 126 (EPA letter) ("a poor cost effectiveness in and of itself should not be construed as a measure of adverse economic impacts"). But Congress appreciated that such judgments were for the States, familiar with local conditions and needs, and not for the EPA. The EPA in this case sought to justify its action as promoting "national consistency," J.A. 148, 303, but Congress in the CAA quite expressly rejected "national consistency" with respect to BACT determinations in favor of state discretion, case-by-case determinations, and site-specific concerns.

ADEC's assessment of the economic impacts on Teck Cominco from requiring SCR as BACT by analogizing to the situation of a rural Alaska utility is a good example. One of the challenges of operating 100 miles north of the Arctic Circle is the inability to plug in to an existing power supply. The Red Dog Mine has to supply its own. In considering the economic impact of requiring SCR as BACT on the mine's power supply, ADEC considered what the impact would be

on a rural Alaska utility in the business of supplying power. After concluding that the impact in such a case would be severe, it made perfect sense for ADEC to regard the impact on Teck Cominco in similar terms. The Ninth Circuit's rejoinder—"Cominco does not, in fact, buy power from an electric utility," Pet. App. 14a—highlights Congress's good sense in leaving such assessments to be made at the state rather than federal level.

If there were something wrong about the manner in which ADEC considered economic costs or any of the other factors it is directed to weigh in determining BACT, any such alleged errors could have been raised in the review process provided in the Alaska SIP. The EPA itself insists that SIPs include such review provisions. But any such alleged shortcomings do not mean that the state-issued PSD permit somehow does not contain a limitation based on BACT, determined by the State after considering the statutory factors. That is the only "BACT requirement" in the CAA, and Teck Cominco's permit plainly complied with that requirement. The EPA's authority to enforce any "requirement" in the Act, therefore, does not authorize it to second-guess the State's BACT determination.

CONCLUSION

For the foregoing reasons, and those in the State of Alaska's brief, the Ninth Circuit's judgment should be reversed.

Respectfully submitted,

ROBERT T. CONNERY
MARCY G. GLENN
HOLLAND & HART LLP
555 17th Street
Suite 3200
Denver, Colorado 80202

LAWRENCE L. HARTIG
ROBERT J. MAHONEY*
HARTIG RHODES HOGE
& LEKISCH
717 K Street
Anchorage, Alaska 99501
(907) 276-1592

* Counsel of Record

Counsel for Teck Cominco Alaska Incorporated